

## Fair Political Practices Commission

### MEMORANDUM

**To:** Chairman Randolph, Commissioners Blair, Downey, Karlan and Knox

**From:** John W. Wallace, Assistant General Counsel  
Luisa Menchaca, General Counsel

**Subject:** Discussion of Proposal of Senator Ross Johnson to Amend  
Regulation 18901, Mass Mailing Sent at Public Expense

**Date:** August 25, 2003

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#### A. ISSUE

Section 89001, as construed by regulation 18901, provides that a mass mailing is prohibited if: (1) the items are delivered, by any means, to the recipient at his or her residence, place of employment or business, or post office box, (2) the costs of distribution is paid for with public moneys or the costs of design, production, and printing are paid with public moneys of \$50 or more, (3) the number sent is 201 or greater substantially similar items in a single calendar month (excluding any item sent in response to an unsolicited request) and (4) the item either *features* an elected officer affiliated with the agency which produces or sends the mailing, or the item includes the name, office, photograph, or other reference to an elected officer affiliated with the agency which produces or sends the mailing, *and* is prepared or sent in cooperation, consultation, coordination, or concert with the elected officer.

“Features an elected officer” is defined as the inclusion of the elected officer’s photograph or signature, or the singling out of the elected officer by the manner of display of his or her name or office in the layout of the document, such as by headlines, captions, type size, typeface, or type color.

Senator Ross Johnson has asked that the Commission expand the definition to include what he considers to be “puff” pieces that favor an incumbent.

#### B. RECOMMENDATION

Staff believes that the statute and regulation currently control the misuse of publicly funded mass mailings while balancing the needs of elected officials to inform and communicate with the public. The current version of the regulation has been in place since 1990 and many of the important definitions in the current version of the regulation have been used consistently since the 1980s. We recommend that the Commission not add regulation 18901 as a regulatory project.

### C. BACKGROUND

In June 1988, Proposition 73 amended Government Code section 89001<sup>1</sup> of the Act to provide: “No newsletter or other mass mailing shall be sent at public expense.” A literal reading of this section led to the conclusion that all mass mailings involving public funds, irrespective of content or purpose, were prohibited by section 89001. The Commission also recognized that a literal reading of the statute would completely ban an officeholder from communicating by mail to his or her constituents. In response to a variety of questions concerning the distribution of items in the normal course of state business, such as tax notices, tax refund checks, community college schedules, sample ballots, and other mass mailings customarily sent by government agencies, the Commission adopted regulation 18901 to clarify which mailings were permissible and which were prohibited under section 89001 of the Act.<sup>2</sup> Under the current version of the regulation,<sup>2</sup> a mailing is prohibited if four criteria are met.

#### *1. Inclusion of a Reference to an Elected Officer*

If the item features<sup>3</sup> an elected officer, *or* includes the name, photograph, or any reference to an elected officer who is affiliated<sup>4</sup> with the agency that produces or distributes the mailing, the item is subject to the restrictions of the regulation. (Regulation 18901(a)(2).)

#### *2. Public Moneys*

Section 89001 provides that no newsletter or other mass mailing shall be sent at public expense. Regulation 18901(a)(3) specifies that a mass mailing is “sent at public expense” within the meaning of section 89001 if either the costs of distribution are paid for with public moneys or more than \$50.00 in public money is paid for the costs of design or production, and the design or printing is done with the intent of sending the item. Thus, items which are produced and distributed at private expense are not subject to the restrictions of regulation 18901.

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<sup>1</sup> All references are to the Government Code unless otherwise indicated.

<sup>2</sup> Since its initial adoption in 1977, the regulation has been amended four times.

<sup>3</sup> “Features an elected officer” means that the item mailed includes the elected officer’s photograph or signature, or singles out the elected officer by the manner of display of his or her name or office in the layout of the document, such as by headlines, captions, type size, typeface, or type color. (Regulation 18901(c)(2).)

<sup>4</sup> Elected officer affiliated with the agency” means an elected officer who is a member, officer, or employee of the agency, or of a subunit thereof such as a committee, or who has supervisory control over the agency, or who appoints one or more members of the agency. (Regulation 18901(c)(1).)

### *3. Delivery*

Regulation 18901(a)(1) restricts items that are mailed or delivered, by any means, to a person's home, office or post office box.

### *4. Mass Mailings*

Finally, Regulation 18901 applies only to a "mass mailing" as defined in the Act. "Mass mailing" means over two hundred substantially similar pieces of mail, but does not include mail which is sent in response to an unsolicited request, letter or other inquiry, or any items that fall within the exceptions set forth in Regulation 18901(b). (Section 82041.5.)

If all four criteria are met, the mass mailing prohibition would apply unless an exception applies. Regulation 18901(b) provides 11 exceptions for mailings that otherwise meet the definitional requirements of 18901(a). They are:

- (1) Letter heads and Roster listings.
- (2) A press release sent to members of the media.
- (3) Items sent in the normal course of business from one governmental entity or officer to another governmental entity or officer.
- (4) Intra-agency communication sent in the normal course of business to employees, officers, deputies, and other staff.
- (5) Items where the use of the elected officer's name, office, title, or signature is necessary to the payment or collection of the funds.
- (6) Items sent by an agency responsible for administering a government program, to persons subject to that program, where the mailing is essential to the functioning of the program.
- (7) Legal notices or other items sent as required by law, court order, or order adopted by an administrative agency.
- (8) Directories, organization charts, or similar listings or rosters.
- (9) Announcements of public meetings which are directly related to the elected officer's incumbent governmental duties, or announcements of official agency events.
- (10) An agendas of meetings and bills, files, histories, etc. of the Legislature
- (11) Business cards.

#### **D. PROPOSAL/ANALYSIS**

As noted above, in order for a mailing to be considered a prohibited “mass mailing,” the mailing must either: (1) *feature* an elected officer affiliated with the agency which produces or sends the mailing, or (2) the item includes the name, office, photograph, or other reference to an elected officer affiliated with the agency which produces or sends the mailing, *and* is prepared or sent in cooperation, consultation, coordination, or concert with the elected officer.

The apparent rationale behind the alternative standards is that in a case where the official is involved in the preparation of a document, the risk of misuse of the item for political benefit is greatest.<sup>5</sup> Thus, the regulation imposes the strictest standard in those cases. The mailing may not include the name, office, photograph, or *any* reference to the official.

In other cases, where the item is prepared independently of the official, featuring is only prohibited. “Features an elected officer” is defined as the inclusion of the elected officer’s photograph or signature, or the singling out of the elected officer by the *manner* of display of his or her name or office in the layout of the document, *such as* by headlines, captions, type size, typeface, or type color.

Senator Ross Johnson has asked that the Commission expand the definition to include what he considers to be “puff” pieces that favor an incumbent. Specifically, Senator Johnson refers to articles in newsletters distributed by the Department of Real Estate and Department of Transportation that reference the Governor. The Senator argues that based on the tone and content of the articles (puff pieces) they should be prohibited under the regulation.

As noted above, staff believes that the statute and regulation currently control the misuse of publicly funded mass mailings while balancing the needs of elected officials to inform and communicate with the public.<sup>6</sup> The current version of the regulation has been in place since 1990 and many of the important definitions in the current version of the regulation have been used consistently since the 1980s. In structuring the definitions in the regulation, the Commission and Commission staff endeavored to set bright line standards, rather than subjective standards based on the content or spin of a given mailing. Thus, the first definition is a flat prohibition.

The definition of a “mass mailing” is a good example of this underlying policy

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<sup>5</sup> This alternate standard was introduced in the 1989.

<sup>6</sup> In the past, the Commission has chosen to maintain the existing balanced approach in response to requests for amendment. For example, at its June, 2000, meeting, the Commission considered a request to review the mass mailing regulation from CalPERS. CalPERS petitioned the Commission to expand the exceptions in regulation 18901 to allow CalPERS to distribute a group photo of the CalPERS Board of Administration as part of any permitted mass mailing. CalPERS believed the amendment should apply to all boards, bodies, commissions and councils. The Commission rejected the request.

consideration. In cases where the official is involved in the preparation of the mailing, the regulation imposes a flat ban on *any* use of the name or reference to the office. In cases where the official is not involved in the content, the mailing is still prohibited if the official is “featured,” which is defined as *the manner of display* of the official’s name, not the content of a given article. Staff recommends that the Commission not amend regulation 18901 to establish a subjective content-based definition of featuring.